- **ABANDONNED ISSUES**

With the exception of setting forth Issue 2 within an introductory section, it does not appear to the Board that [Petitioner] has presented any argument, written or oral, as to this issue … In addition, the Board finds no argument supporting Issue 7 … Although cursory reference to this issue was made in a footnote and an excerpt of the challenged provisions was noted within OSF's brief, this does not amount to briefing of the issue. Therefore, pursuant to WAC 242-02-570, the Board deems these issues abandoned. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 6 (Nov. 19, 2008)

- **AGRICULTURAL LANDS**

For Board's perspective on the designation of Agricultural Lands of Long-Term Commercial Significance based on RCW and WAC provisions and Supreme Court cases, *see* Coordinated Cases of *Hadaller, et al v. Lewis County,* Case No. 08-2-0004, *Butler, et al v. Lewis County,* Case No. 99-2-0027, *Panesko, et al v. Lewis County,* Case No. 00-2-0031c, FDO and Compliance Order, at 22-26 (July 7, 2008). Key holdings:

> [B]y commencing their review based solely on the presence of prime soils, the County failed to consider a key element of the GMA's definition for agricultural land – that the land is primarily devoted to commercial agriculture, which our Supreme Court has concluded means that land is actually used or capable of being used for agricultural production. As noted supra, the first focus for a jurisdiction in making its designation determinations is to look at the general characteristics of the property itself and whether it can be used for any of the types of agriculture enumerated in .030(2). Although, soils play a significant role in determining whether land is capable for agricultural uses, it is not the exclusive method since some types of agriculture are not soil dependent. Therefore, by failing to initially base its methodology on an evaluation of parcels within Lewis County that are actually being used or are capable of being used for agriculture, the County inappropriately narrowed the universe of land beyond that anticipated by the Legislature when it defined agricultural land. FDO/Compliance Order, at 29-30.
>
> Although the Census of Agriculture is a tool that can be helpful in identifying farms that are currently being farmed and the amount of farmland eligible for designation, counties are not mandated to use it in the designation process. FDO/Compliance Order, at 30.
>
> [In response to Petitioners' assertion that the phrase "capable of being farmed" must be included within the County's definition of agriculture, the Board stated:] What Petitioners seek is to have the County provide the definition language our Supreme Court has applied to the phrase "primarily devoted to". The Board

believes this to be unnecessary as where the Supreme Court has interpreted a statutory definition, the County's use of that definition necessarily includes the Court's interpretation. It is not necessary to amend a definition to include the Court's language. FDO/Compliance Order, at 33.

[In response to Petitioners' assertion that the County failed to properly consider poultry farms and Christmas tree farms, the Board concluded:] The GMA seeks to enhance and maintain natural resource industries, not merely the prime soils upon which many, but not all, such industries depend. By excluding from consideration for ARL designation non-soil dependant uses the County failed to maintain and enhance those natural resource uses. The County is not required to designate all non-soil dependant agricultural uses ARL, but it may not exclude them solely on the basis that non-prime soils underlie the use. In this context the need to focus on the maintenance and enhancement of natural resources industries, rather than merely preserving prime soils, poultry farming serves well to illustrate the point. FDO/Compliance Order, at 35.

[The USDA's] Soil Conservation's Service (SCS) Handbook 210 has been updated by the NRCS November 2006 publication. While WAC 365-190-050 references USDA Handbook 210, CTED states that until it amends this WAC, its interpretation is that a county using the updated USDA publication for the purpose of classifying ARLS fulfills the intent of the WAC provision. FDO/Compliance Order, at 41. *See also* Pages 41-43 for additional discussion in regards to soil classification within the designation process.

The GMA does not assign or dictate the weight of each [WAC] factor and, therefore, a jurisdiction has some discretion regarding how to apply them. The Board notes that while a jurisdiction has discretion, these ten factors must be evaluated in light of the conservation imperative set forth by the GMA. In contrast to the analysis of capacity, productivity, and soils, the focus of these factors is on the development prospects of the site and, as the Supreme Court found in *Lewis County,* may potentially pertain to factors not specifically enumerated in RCW 36.70A.030(10), including the economic needs of the agricultural industry for the county as a whole, so long as these considerations are within the mandates of the GMA and pertain to the characteristics of the agricultural land to be evaluated. FDO/Compliance Order, at 46.

[In addressing the County's use of the WAC factors, the Board noted:] Although the County's review was based on an area by area analysis so as to take into account "geographical and economical considerations," it is the inconsistent application of the criteria which concerns the Board the most, not review based on subarea. While the Board recognizes that the County has discretion on how much weight to give each criteria, applying criteria in an inconsistent manner leads to arbitrary decision-making. It is evident from the Record that the County

did not consistently apply the criteria when analyzing varying subareas, with criteria being given differing weight based … primarily in the name of economic development … As this Board has previously stated, the GMA creates a mandate to designate agricultural lands by including goals with directive language as well as specific requirements and that the GMA's economic development goal does not supersede this agricultural mandate set forth by the Supreme Court. FDO/Compliance Order, at 49-50.

[T]he Board notes that the GMA recognizes that agricultural lands can be de-designated if these lands are no longer commercially significant and provides mechanisms for economic development opportunities in designated rural and agricultural lands through the use of Master Planned Developments (MID) and Master Planned Locations for Major Industrial Activity (MPLMIA), Master Planned Resorts (MPR), and Fully Contained Communities (FCC), all available to Lewis County. In allowing for these uses in rural and agricultural lands, the Legislature set up a well defined process to ensure that these developments would not detract from the goal of directing urban growth to urban areas and creating sprawl. The GMA is focused on concentrating all types of growth – residential, commercial, and industrial – in urban areas because it is these areas that have the supporting public facilities and services critical to economic development. FDO/Compliance Order, at 51.

[T]he continuation of lands suitable for agricultural production should be retained until such time as the County has no other option but to consider whether these lands are no longer capable of serving in a commercially viable way and that these lands are in fact needed to accommodate growth. What Lewis County is doing is removing agricultural lands based on speculative, future economic development and seeking to utilize these lands to provide for potential expansion areas. FDO/Compliance Order, at 52.

[Petitioner's] argument that his property has never produced a profitable crop does not demonstrate that the County was clearly erroneous in designating it ARL. Although the *Lewis County* Court did note that the GMA was not intended to trap anyone in economic failure, when it comes to agricultural lands, it is the economic concerns of the agricultural industry not an individual farmer's economic needs that are to be considered. Whether a competent commercial farmer would go broke trying to farm the land is not the test the Legislature or the Courts require the County to apply when designation agricultural lands of long term commercial significance. FDO/Compliance Order, at 57.

[WAC 365-190-050(1)] advises that the appropriate place for the classification scheme and designation policies is in the comprehensive plan. There is no clear error in including the designation criteria in the Comprehensive Plan rather than within the County Code. FDO/Compliance Order, at 60.

> [In finding that the County was classifying accessory uses as primary uses, the Board stated:] … RCW 36.70A.177 permits the use of innovative zoning techniques but specifically prohibits non-farm uses of agricultural land and relegates other non-agricultural uses to the status of *accessory* and to those areas with poor soils or otherwise unsuitable for agricultural purposes. The Board reads this provision, in conjunction with the GMA's mandate for agricultural conservation, to mean that the only primary use of ARL lands is one that is agricultural, all other uses are subordinate to this [accessory/subordinate uses are intended to provide supplementary, not primary, income to the farm]. FDO/Compliance Order, at 64-65.
>
> [U]nder the GMA agricultural is not limited to crop production but includes such non-crop related activities as dairies, poultry farms, and fish hatcheries - all of these activities require structures which may overlay prime soils. To allow for conversion of previously converted prime soils based on "non-crop" related uses effectively negates the GMA's mandate to maintain that portion of the agricultural industry which does not produce crops and, in essence, permits a poultry barn on prime soils to become a residential subdivision merely because it does not involve crop production despite the fact that the use is agricultural and has prime soils. If conversion should be permitted to occur, it should occur to favor the retention of those areas with prime soil, not for the long-term removal of lands from agricultural use. FDO/Compliance Order, at 68.

- **BEST AVAILABLE SCIENCE**

[When establishing buffers for streams, Petitioner, in citing to *Swinomish* and *Ferry County* asserted that the Record needs to contain evidence demonstrating that the County —undertook the required reasoned process of balancing the various planning goals against BAS. The Board disagreed and stated:] … the Board does not read these two cases as requiring a balancing between the GMA's mandate to protect critical areas and the non-prioritized goals jurisdictions are to use as a guide when developing comprehensive plans and development regulations. Rather, both *Swinomish* and *Ferry County* set forth the principle that if a jurisdiction seeks to deviate from BAS it must provide a reasoned justification for such a deviation. In addition, the Court of Appeals in *WEAN v. Island County* stated that it is when a jurisdiction elects to adopt a critical area requirement that is outside the range that BAS would support, the jurisdiction must provided findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice. Here, Jefferson County's choice of buffer width did not deviate from BAS; rather the County selected a width within the range of BAS and as such, although the balancing of GMA goals is always required in the context of GMA planning, the justification sought by OSF is not needed for a decision supported by BAS. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 19-20 (Nov. 19, 2008).

[In response to a finding of non-compliance by the Board, the County reinstated previous provisions related to dike monitoring. Petitioners/Intervenors asserted that those provisions were not based on BAS and the program did not adequately protect critical areas. The Board held:]. Petitioners have failed to present any argument why the Skillings-Connolly report is no longer relevant BAS and have failed to present evidence of new BAS. Nor have they shown why the dike monitoring program, previously held to be compliant, is at odds with new BAS. Therefore, the Board concludes that neither the Petitioners nor the Intervenor have demonstrated that the County's actions in reinstating its dike monitoring program are clearly erroneous based on a failure to consider BAS or other unspecified "additional information". Furthermore, to the extent that the Petitioners or Intervenor are suggesting that the dike monitoring program is insufficient because it is not being properly implemented, the parties are reminded that the Board's role is to determine if the County's Comprehensive Plan and development regulations are in compliance with the GMA. The Board does not have any role in ensuring that the County fully implements its regulations. *ARD/Diehl v. Mason County,* Case No. 07-2-0010, Order on Compliance, at 9-10 (Oct. 20, 2008).

ICC 17.03.040 [a provision of the County's zoning code] was not amended by the challenged enactment and, since its adoption in 1998, RCW 36.70A.172(1), has not been subject to an amendment which would require Island County to update its zoning code. Thus, although on initial review it would appear WEAN's challenge to the definition set forth in ICC 17.03.040 is untimely, WEAN is not challenging ICC 17.03.040 in isolation but the incorporation of this provision into the critical areas ordinance (CAO) which is required to include BAS. The use of BAS would necessarily correlate to the most current science. *WEAN/CARE v. Island County,* Case No. 08-2-0026c, FDO at 16 (Nov. 17, 2008).

[As to the GMA's requirement for the use of BAS, the Board noted:] … the adjective "available" generally meaning to be present or ready for immediate use. Therefore, the word "available" would be pointless if construed to mean science that is expected to be available at some future date, especially given the GMA's requirement to include BAS - as how can the County include that which does not exist? *WEAN/CARE v. Island County,* Case No. 08-2-0026c, Order on Reconsideration at 4 (Dec. 22, 2008).

The Board recognizes that a graduate-level research study, such as the Pantier Thesis, may satisfy WAC 365-195-906's criteria for a valid scientific process. However, parties should not take for granted that any document will be automatically considered BAS under the GMA just because it is scientific in nature. Petitioners asserting that a jurisdiction has failed to utilize BAS and are countering the jurisdiction's actions with a competing document must ensure that the document conforms to the WAC criteria for BAS so that it will be properly considered by the Board. *WEAN/CARE v. Island County,* Order on Reconsideration at 10 (Dec. 22, 2008).

WEAN wants the Board to ignore all other numbers in favor of the numbers presented in the Pantier Thesis. In other words, WEAN requests that the Board grant the Pantier Thesis the status of BEST available science and argues that Island County was required to use the results of that research when developing its definitional criteria for MF wetlands. RCW 36.70A.172 requires Island County to include and consider BAS when developing critical area regulations. In doing so, the County is permitted to not adopt WEAN's scientific recommendations and resources in favor of other valid scientific information. In fact, this is the discretion the Legislature has granted the County and to which the Board is directed to defer. It is not for the Board to decide what is the BEST science or to displace the County's judgment about which science to rely upon with its own. *WEAN/CARE v. Island County,* Order on Reconsideration at 12-13 (Dec. 22, 2008)

For further discussion as to qualifications for BAS *See WEAN /CARE v. Island County,* Case No. 08-2-0026c, FDO at 49-54 (Nov 17, 2008).

- **CAPITAL FACILITIES PLANNING**

The Capital Facilities Plan, including the referenced Belfair and Allyn Stormwater Plans, provides no narrative that shows the sources for funds in the grant category of the six-year plans. While the March 24, 2008 Planning Advisory Commission and the June 17, 2008 Staff Report on adopting a stormwater utility indicate that grants have been secured to support the six-year stormwater capital facilities plan, the six-year capital facilities plan does not indicate the sources of the grant funding, whether they have been secured, or evaluate the likelihood of obtaining these grant resources. Also, "Other Sources" are not identified so is impossible to determine if stormwater utility rates will be needed to finance stormwater capital facilities, or what these other sources might be. Because the County's six-year capital facilities plan does not clearly identify sources of public money needed to finance the stormwater plans , it does not comply with RCW 36.70A.070(3)(d). *ARD/Diehl v. Mason County,* Case No. 06-2-0005, Compliance Order, at 12-13 (Dec. 9, 2008)

The County has now adopted a development regulation, MCC17.03.030 B (1), that allows for commercial and industrial development on temporary holding tanks within the UGA. These regulations conclude that temporary holding tanks are not considered an "on site septic system". While temporary holding tanks are not an "on-site system" that does not mean they are an urban service pursuant to RCW 36.70A.030(20) … The Board has the same concerns about temporary holding tanks that we had about community septic systems. MCC 17.030.030 B(1) continues to allow urban growth before urban services are available. Therefore, Mason County has failed to carry its burden of proof that it no longer allows urban development without the availability of urban services. *ARD/Diehl v. Mason County,* Case No. 06-2-0005, Compliance Order, at 18 (Dec. 9, 2008)

Even though this Board has held almost since its inception that the GMA required counties to show how it planned to serve its entire UGA and that these plans should not be speculative, the Board also recognized that policies, regulations, and plans needed more flexibility in later years of the plan [noting that Goal 12 requires reasonable assurances, not absolute guarantees, and that funding strategies will need to be more flexible in later years and more definitive in the immediate future]. *ARD/Diehl v. Mason County,* Case No. 06-2-0005, Compliance Order, at 23 (Dec. 9, 2008)

RCW 36.70A.020(9) is a GMA goal. Consideration of that goal needs to be grounded in the assessment of the UGA's capital facilities needs for recreational facilities as evidenced in the Record. Although the evidence in the Record shows a great desire for a soccer complex and that advocates believe there is a need for such a facility, there is no evidence in the Record that shows what the County's level of service for soccer fields is, whether a deficiency for these recreational facilities exist, whether other suitable properties were considered and rejected, and that there is a need to expand the UGA in this location for just this single-purpose reason. *Petree, et al v. Whatcom County,* Case No. 08-2-0021c, FDO at 13-14 (Oct. 13, 2008)

In addressing Skagit County's 11-year effort to establish a non-municipal Urban Growth Area (UGA), the Board noted how difficult it is to establish a non-municipal UGA especially in regards tow providing urban services to the UGA when relying on multiple non-County owned service providers. The Board addressed the capital facilities for the UGA including parks, fire, school, and sewer service. *Abernoth, et al and Skagit County Growthwatch, et al v. Skagit County,* Coordinated Case Nos. 97-2-0060c and 07-2-0002, Compliance Order (Dec. 23, 2008).

> Parks: [RCW 36.70A.070(3) requires a capital facilities plan element consisting of; (b)… a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities] the County has not included a forecast of future Bayview Ridge UGA's park needs or proposed locations and capacities of needed park facilities. ***…*** The County has made a financial commitment to reassess Bayview Ridge UGA's park needs sizes and location, but has not established park facility needs based on its new LOS or proposed locations and capacities of future facilities. Thus, the Board finds the County has not achieved compliance with RCW 36.70A.070(b) and (c). Compliance Order, at 9-10.
>
> Sewer: [Finding compliance with the GMA when relying on a city for sewer service within a non-municipal UGA, the Board stated:] …[The] sewer plan by the City of Burlington shows that sufficient sewer service will be provided to the Bayview Ridge UGA over the 20 year life of the plan so that Subarea Plan for sewer service now complies with RCW 36.70A.070(3)(b) and (c). Furthermore, the County has clearly referenced the Burlington Sewer Plan and the 2007

> Supplement to this plan in the Subarea Plan's Capital Facilities Chapter. Compliance Order, at 13-14.

[T]he Board finds the GMA does not require the County to provide urban services immediately to the entire UGA or prohibit the County from providing reasonable options for development in the UGA before they arrive. Nevertheless, these options [such as sewer connection standards, concurrency requirements, zoning regulations, and existing land use patterns] must be provided consistent with GMA requirements and goals. *Abernorth, et al v. Skagit County,* Coordinate Case Nos. 97-2-0060c and 07-2-0002, Compliance Order, at 23 (Dec. 23, 2008).

[In the original FDO(s), the UGA element did not contain the necessary capital facilities planning. On compliance, the Board found:] … that the County's capital facilities plan re-adopts the PUD Water System Plan by reference. This amendment adds the necessary inventory, locations, and capacities of future water system facilities needed to comply with RCW 36.70A.070(3)(a)(b) and (c). Additionally, the County has removed the earlier language suggesting that further amendments in the PUD Water System Plan could occur without independent review and approval by the County through the Comprehensive Plan amendment process. *ICAN v Jefferson County,* Coordinated Case Nos. 03-2-0010, 04-2-0022, 07-2-0012, Order on Compliance, at 6 (Oct. 22, 2008).

- **COMPLIANCE PROCEEDINGS – Non-Compliance and Invalidity**

Rescinding invalid regulations is an appropriate response in this instance to a finding of invalidity [as it removes the basis for the Board's earlier determination]. *ARD/Diehl v. Mason County,* Case No. 07-2-0010, Order on Compliance, at 7 (Oct. 20, 2008)

Although the Board does not generally allow new issues to be raised in a compliance proceeding, an issue regarding adherence to public participation requirements during the County's attempt to achieve compliance is sufficiently related to the compliance proceeding itself and may be raised by a petitioner in the objections. Coordinated Cases *Butler, et al v. Lewis County*, Case No. 99-2-0027c, *Panesko, et al v. Lewis County,* Case No. 00-2-0031c, *Hadaller, et al v. Lewis County,* Case No. 08-2-0004, Compliance Order and FDO, at 17 (July 7, 2008)

[I]t is inappropriate for the County to transfer lands into the Toledo UGA while such lands are still under invalidity … Although the land designated for the Toledo UGA expansion may be appropriate for inclusion in the UGA, the County may not expand the UGA to include land under invalidity. Only after invalidity has been lifted from the affected parcels may the County include this land in the UGA. *Panesko, et al v. Lewis County,* Case No. 08-2-0007, FDO, at 26, 29 (Aug. 15, 2008).

[T]he Board sees the primary question raised on reconsideration as essentially the impact of a Determination of Invalidity – does it solely invalidate a non-compliant

jurisdiction's comprehensive plan and/or development regulations or are the lands themselves restrained by the invalidity so as to preclude future land use planning decisions from impacting these lands? The GMA authorizes the Board to issue a Determination of Invalidity as to part or all of a comprehensive plan or development regulation upon finding a jurisdiction is non-compliant with the GMA and that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA.The GMA further provides there are two ways in which invalidity may be removed – by motion of the county or city subject to such invalidity or after a compliance hearing which considered the county's or city's enactment amending the invalidated part or parts of the plan or regulation. The driving analysis in all regards remains the requirement that any legislative enactment not only comply with the requirements of the GMA, but also that it not substantially interfere with the goals of the GMA. Therefore, … it is the non-compliant jurisdiction's comprehensive plan and/or development regulations that are rendered invalid, not the land itself. However, the County's Comprehensive Plan is a generalized coordinated land use policy statement that serves as a guiding framework, the blueprint for all land use planning decisions made by the County. Its development regulations implement those goals and policies set forth in the comprehensive plan and represent the controls placed on the development and use of land. As such, when a comprehensive plan or development regulation has been invalidated, this invalidation is intrinsically linked to the use of land which those policies, goals, and regulations address. After all, the purpose of invalidation is to preclude non-GMA compliant development from occurring until such time as the jurisdiction has taken responsive action to remedy its non-compliant action of the past … a Determination of Invalidity does in fact impede future land use planning decisions – it places such decisions on hold until the jurisdiction has demonstrated compliance with the GMA. *Panesko, et al v. Lewis County,* case No. 08-2-0007, Order on Reconsideration, at 19-20 (Sept. 15, 2008).

- **COMPREHENSIVE PLAN/DEVELOPMENT REGULATIONS UPDATES – RCW 36.70A.130**

[In determining whether development regulations which had been adopted in 2001 but are incorporated by reference within regulations adopted as part of the County's required RCW 36.70A.130(1) update are open to challenge, the Board stated:] … the reasoning and rationale set forth by the Supreme Court in the *Thurston County* matter, in regards to updates conducted pursuant to RCW 36.70A.130 for comprehensive plans, applies equally to development regulations. [Based on the Supreme Court's holding the Board concluded Petitioner was limited to challenges for failures to update provisions directly affected by new or recently amended GMA provisions and the Board found no amendments to the GMA which would have required the County to update these 2001 regulations. Thus, Petitioner's challenge was untimely]. *OSF/CPCA v. Jefferson County,* FDO, at 11-13 (Nov. 19, 2008)

- **CRITICAL AREAS – In General**

The guidance offered in [Wetlands in Washington] Volume 2, that was based on the BAS synthesized in [Wetlands in Washington] Volume 1, and was considered by the County, recognizes that viable data was not yet available on wildlife habitat or wildlife corridors. Without the needed scientific data, it is impractical for the County to develop regulations based on a landscape approach. For this reason, the Board finds and concludes that the County's decision to use a site-based approach to protect wetlands rather than a landscape-based approach is not a clearly erroneous violation of RCW 36.70A.040(3), RCW 36.70A.060, and RCW 36.70A.170(1). *WEAN/CARE v. Island County,* Case No. 08-2-0026c, FDO at 14 (Nov 17, 2008).

> --*See also,* Dec 22, 2008 Order on Reconsideration for *WEAN/CARE v. Island County* where the Board clarified its holding in regards to the landscape approach.
>
> [T]he science in the Record noted that the performance of wetland functions is controlled by a number of environmental factors within the wetland boundary (site scale) as well as in the broader landscape (landscape scale) and that wetlands do not function in isolation, but rather a wetland's ability to provide certain functions is influenced by the conditions and land uses within their contributing basins. However, the Board noted that the data needed to develop a comprehensive, landscaped-based approach within Island County was not available at this point in time. [Citing to Ecology's Wetland Manual, the Board concluded:] In other words, although the science may suggest utilizing a landscape approach, there is no science in the record for implementing such an approach … the GMA requires the inclusion of the Best Available Science which is science that is presently available as well as practically and economically feasible so as to protect critical areas. The Board finds reliance on prescriptive buffers which incorporate readily available science and is a method supported by Ecology does not fail to protect the functions and values of wetlands. Order on Reconsideration, at 4-5.

For discussion as to measures for the protection of wetland functions and values, including buffers, mitigation, mature wetland forests, land use intensity and fencing, *see WEAN/CARE v. Island County,* Case No. 08-2-0026c, FDO at 54-73 and, for further clarification, Dec. 22, 2008 Order on Reconsideration at 6-14 and 17-21.

[B]ecause Island County is well along is establishing a baseline for certain wetland parameters due the completion of the assessment and survey completed for the *Phase 1 Report*, has adopted a system of protective buffers, and is following Ecology's recommendations on what kind of information to collect and report, the Board finds that an adaptive management and monitoring program with benchmarks and triggering mechanism that the Board found necessary in previous cases [such as *Swinomish Tribe v. Skagit County*, WWGMHB 02-2-0012, *Olympic Environmental Council v. Jefferson*

County , WWGMHB 02-2-0015, and *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c] is not critical at this stage of the County's monitoring and adaptive management program. *WEAN/CARE v. Island County,* Case No. 08-2-0026c, FDO at 75 (Nov. 17, 2008).

- **CRITICAL AREAS – Channel Migration Zones**

See OSF/CPCA v. Jefferson County, Case No. 08-2-0029c, FDO at 31-39 for general discussion on CMZs including designation, risk assessment, and development standards.

The Board views the GMA as effectively establishing two categories of critical areas – those areas whose functions and values are protected for the beneficial services they provide (i.e. Wetlands, FWHCAs, Aquifer Recharge Areas) and those areas for which protection is needed due to the threat these areas pose to persons and property (i.e. Frequently Flooded Areas, GHAs). *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 27 (Nov. 19, 2008).

[In determining if the County's action of designating CMZs as a Geological Hazard Area was clearly erroneous, the Board concluded:] … designation of GHAs is based, in part, on an analysis of historical activity of the site and the potential or susceptibility of the site for future geological instability based on historical data in combination with present day scientific methodologies … It is this futuristic potential or susceptibility of damage that creates the risk for which critical area designation as a GHA is needed. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 28 (Nov. 19, 2008).

[In responding to Petitioner's assertion that the functions and values of a designated critical area must presenting existing, the Board stated:] … the Board disagrees with Petitioner's contention that the functions and values of a CMZ do not presently exist and therefore the GMA does not authorize the designation. To support this statement would be contrary to the very functions and values underlying a GHA - to protect against *future* loss of life and/or property due to the geological event being addressed. In other words, the functions and values sought to be protected by GHAs are the protection of life and property and those functions and values exist today. Here, Jefferson County, in considering the geological consequences of channel migration, namely the potential for stream bank erosion and channel migration within the historical and projected path of a stream or river, appropriately designated CMZs as a type of GHA given the geological nature of the impacts. As such, the County's designation of CMZs as a critical area is appropriate under the GMA. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 29 (Nov. 19, 2008).

[In noting that development regulations intended to protect critical areas must be based on BAS, the Board held:] The Board finds that although the retention of vegetation [within a CMZ] is important, the importance of vegetation retention is based on bank stabilization and erosion protection and is therefore more relevant within high

to moderate risk areas which are at a greater probability of being impacted by the river or stream's migration. A blanket restriction on the removal of vegetation that is not linked to the functions and values it is intended to protect is not supported by BAS. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 37-39 (Nov. 19, 2008).

- **CRITCAL AREAS – Reasonable Use Provisions**

The Board recognizes that although they may actually permit impacts to a critical area, reasonable use provisions are an indispensable component of critical area regulations because they address the issue of regulatory takings claims. Regulatory takings have been an element of American jurisprudence since the 1920s and are founded on constitutional principles, seeking to provide a remedy when a regulation takes *all reasonable use* of a parcel of land. Given this grounding in constitutional law, the Board has no jurisdiction to determine Petitioners' claims as to whether the County's regulations exceed what is necessary to protect the County from a constitutionally-based takings claim as this is a question for the courts. However, although reasonable use provisions are necessary to prevent a constitutional takings claim, that does not mean such provisions should not prevent the protection of all the functions and values of wetlands and do not need to be supported by BAS. *WEAN/CARE v. Island County,* Case No. 08-2-0026c, FDO at 23 (Nov. 17, 2008).

Permitting uses based upon uses that were established, albeit legally, prior to the adoption of ordinances that required the protection of critical areas cannot be considered a regulation that includes BAS. Instead such a regulation improperly employs existing uses as the benchmark of what is appropriate in the vicinity of critical areas and merely perpetuates the establishment of uses that are incompatible with BAS. *WEAN/CARE v. Island County,* Case No. 08-2-0026c, FDO at 26 (Nov. 17, 2008).

- **FILING and/or SERVICE OF PAPERS**

[Petitioners untimely filed objections with the Board and did not serve the County until a week later. However, the Board considered Petitioner's objections and stated:] During oral argument, the County did not formally object to the late filing or argue prejudice and for that reason the Board will consider Petitioner's objections. *1000 Friends v. Thurston County*, Case No. 05-2-0002, Compliance Order on Remand, at 3 (Oct. 23, 2008).

- **INTERNAL INCONSISTENCIES**

RCW 36.70A.070 requires consistency among elements of the comprehensive plan, not between the provisions of the adopting ordinance. The Board knows of no provision of the GMA that requires provisions of an adopting ordinance to be consistent. *Petree, et al v. Whatcom County,* Case No. 08-2-0021c, FDO at 54 (Oct. 13, 2008)

[N]ot every area of vagueness or ambiguity in a comprehensive plan rises to the level of an internal inconsistency within the meaning of the preamble of RCW 36.70A.070. Consistency means that no feature of the plan or regulation is incompatible with any other feature of the plan or regulation; no feature of one plan may preclude achievement of any other feature of that plan or any other plan. *Brinnon Group, et al v. Jefferson County,* Case No. 08-2-0014, FDO, at 20 (Sept. 15, 2008)

- **ISSUE STATEMENTS**

[In denying Petitioner's attempts to argue that the County's notice was insufficient when the issue statement cited only to RCW 36.70A.140, the Board stated:] [WAC 242-02-210(2)(c)] would be rendered meaningless were Petitioner permitted to pursue an appeal based upon an alleged violation of a section of the GMA not specified in the Petition for Review. Further, considering a claim founded on the requirements of RCW 36.70A.035 when such a violation was not alleged in the Petition for Review or contained in the Prehearing Order would be inconsistent with RCW 36.70A.290(1) [Board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order]. Because Petitioner's claims do not address the establishment of the County's public participation program, but rather the sufficiency of the notice provided to the public, an issue of compliance with RCW 36.70A.035, the Board finds that Petitioner has not established a violation of RCW 36.70A.140. *Spraitzar v. Island County,* Case No. 08-2-0023, FDO, at 8-9 (Nov. 10, 2008).

- **JURISDICTION**

…within [Petitioner's] briefing were several assertions based on constitutional premises [nexus and rough proportionality]. This Board has previously held, and reaffirms today, that the GMA does not confer upon the Boards the authority to determine constitutionally-based claims and therefore such claims will not be addressed within this Final Decision and Order. *Olympic Stewardship Foundation and Citizens Protecting Critical Areas v. Jefferson County,* Case No. 08-2-0029c, FDO, at 14-15 (Nov. 19, 2008)

This Board has previously held it does not have jurisdiction to determine whether property rights have been violated based on RCW 36.70A.370, primarily due to the constitutional nature of such challenges. However, this Board has also stated .370(2) mandates that local governments —utilize the adopted process and, although the substance of the process used is protected by attorney-client privilege, there must be evidence which demonstrates the process recommended by the AG was utilized in adopting the challenge ordinance … [in reviewing the County's action for compliance with the AG process, the Board found] these considerations are incorporated within Findings/Conclusions 144 through 149 of the challenged Ordinance which address private property rights. Although it would have benefited Jefferson County to clearly denote it had utilized the AG's process and therefore complied with RCW

36.70A.370(2), the Board finds, based on the Ordinance's own language, sufficient evidence in the Record to conclude the County utilized the required process. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 42-43 (Nov. 19, 2008).

- **LIMITED AREAS OF MORE INTENSIVE RURAL DEVELOPMENT (LAMIRDs)**

See Oct. 23, 2008 Order Finding Compliance on Remand *1000 Friends v. Thurston County,* Case No. 05-2-0002 (Finding compliance based on the Thurston County Superior Court's reversal of the Board as to the Rochester LAMIRD in *Rochester Water Association et al. v. Western Washington Growth Management Hearings Board, et al.* Thurston County Superior Court Case Nos. 07-2-02533-0 and 07-2-02557-0, Agreed Order (Sept. 4, 2008))

A Type 1 LAMIRD requires the areas included be delineated predominantly by the *built* environment. Mere clearing and grubbing of the land does not satisfy this requirement, the GMA seeks man-made structures. *Panesko, et al v. Lewis County,* Case No. 08-2-0007, FDO, at 33 (Aug 15, 2008).

- **MARKET FACTOR**

See also URBAN GROWTH AREAS

[T]he Board reads the GMA as authorizing the use of a reasonable land market supply factor which is intended to reduce the total net buildable acreage of land within a UGA by a set percentage to account for the fact that not all buildable land will be developed within the 20-year planning horizon. Whether a jurisdiction calls this adjustment a land availability factor, a market factor, a safety factor, or a cushion – it serves the same purpose … Thus, Petitioners' contention that Bellingham was permitted to use a "land availability factor" intended to reflect that not all developable land will be available for development and a "safety factor" intended to provide for an excess of land so as to assure affordability is not supported by the GMA. To size the UGA in excess of the acreage required to accommodate the urban growth projection based upon any other reduction factor other than market factor is simply not authorized by the GMA. *Petree, et al v. Whatcom County,* Case No. 08-2-0021c, FDO at 30-31 (Oct 13, 2008)

[In its Aug. 15, 2008 for *Panesko, et al v. Lewis County,* Case No. 08-2-0007, the Board found that Lewis County failed to "show its work" in regards to the market factor it utilized to size a UGA. The County and an intervening City asserted that based on the Supreme Court's holding in *Thurston County v. Western Washington Growth Management Hearings Board,* issued just one day prior to the FDO, the Board's requirement for justification must be reversed. In response, the Board stated:]

The phrase "show your work" was used … to describe the explicit documentation of factors and data used by counties when undertaking the sizing of UGAs. Because UGA sizing relies primarily on mathematical calculations and numerical assumptions, the Board concluded that such a showing of work was required in order to demonstrate the analytical rigor and accounting that supported the sizing and designation of UGAs. Without that both the Board and interested citizens would have no criteria against which to judge a County's UGA delineation. This requirement was subsequently adopted by this Board. However, it has since been clarified that requiring the record to support a jurisdiction's actions neither amounts to "justification" nor does it result in a shifting of the burden; the burden remains on the petitioner to demonstrate the analysis was clearly erroneous.

The Board recognizes that, as with all legislative enactments, comprehensive plans and development regulations are presumed valid upon adoption. However, a presumption is not evidence; its efficacy is lost when the opposing party adduces prima facie evidence to the contrary. Therefore, the presumption of validity accorded to legislative enactments is not conclusive but rebuttable. In order to overcome the presumption, a petitioner must persuade the Board that the jurisdiction's action was clearly erroneous and to do so it must present clear, well-reasoned legal argument supported by appropriate reference to the relevant facts, statutory provisions, and case law which establishes that the GMA's requirements have not been met. Once a petitioner has overcome the presumption, the responding jurisdiction must then present evidence to contradict a petitioner's allegations.

The Board recognizes the Supreme Court's holding that a requirement for the County to identify and prospectively justify its market factor in its comprehensive plan distorts the presumption of validity afforded to such enactments. Thus, this Board finds that a local jurisdiction planning under the GMA is not required to explicitly identify or set forth a prospective justification for a market factor within its comprehensive plan. However, the Board does not read the Court's holding in Thurston County as transforming the presumption of validity into a conclusive presumption. The presumption of validity is rebuttable and remains as such.

…

Therefore, the purpose and function of the Board's "show your work" requirement is, and in this Board's view has always been, a demonstration by the County upon challenge of the facts and evidence supporting its action in response to a petitioner's prima facie case. There is no distortion of the presumption of validity or a shifting of the burden. The presumption is rebuttable by evidence and legal argument. If rebutted it then becomes incumbent upon the County to present contrary evidence from the Record. Without having the ability to review supporting evidentiary documentation, the Board's ability to

determine whether a jurisdiction has complied with the GMA would be irretrievably compromised. Order on Reconsideration, at 7-9 (Sept 15, 2008).

- **PLANNING GOALS – RCW 36.70A.020**

[T]he ultimate test of whether the County considered the goals is in the determination of whether the challenged action was guided by those goals … nothing in the GMA requires a specific delineation of such consideration. The Record before the Board clearly demonstrates the GMA's goals, although not explicitly referenced, were before the County Council during the process that led to the adoption of [the challenged ordinance] and deliberation and contemplation as to the issues related to the goals occurred. *Petree, et al v. Whatcom County,* Case No. 08-2-0021c, FDO at 38-39 (Oct. 13, 2008) [See Pages 39-48 for Board's evaluation as to whether the County's action was guided by the GMA's goals].

- **PRIVATE PROPERTY RIGHTS – Goal 6 (RCW 36.70A.020(6))**

[The Board re-iterated the test for a Goal 6 challenge] … in order for a petitioner to prevail in a challenge based on Goal 6, they must prove that the action taken by a local jurisdiction has impacted a legally recognized right and that the action is *both* arbitrary *and* discriminatory. Showing only one is insufficient to overcome the presumption of validity that is accorded to jurisdictions by the GMA. In addition, this Board has held that the protection prong of Goal 6 involves a requirement for the protection of a *legally recognized* right of a landowner being singled out for unreasoned and ill-conceived action. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 43 (Nov. 19, 2008).

See also, Hadaller, et al v. Lewis County, Case No. 08-2-0004, FDO, at 14-15 (July 7, 2008) [Case was coordinated with compliance proceedings for *Butler, et al v. Lewis County*, Case No. 99-2-0027c and *Panesko, et al v. Lewis County,* Case No. 00-2-0031c]

- **PUBLIC PARTICIPATION**

No provision of the GMA or the County's code is cited by Petitioner to support its position that the County is required to respond directly or specifically to public comments. What the GMA requires is for adequate notice to be given, opportunities to comment provided according to the County's public participation procedures, and that the County make its decision in accordance with GMA goals and requirements. While many counties and cities document comments received and their response to them, it is not a requirement of RCW 36.70A.140, RCW 36.70A.035, or RCW 36.70A.070, nor does [Petitioner] cite any provision of the Whatcom County Code which requires specific

response. *Petree, et al v. Whatcom County,* Case No. 08-2-0021c, FDO at 10 (Oct. 13, 2008)

[Board recognized the GMA provisions related to public participation:] … RCW 36.70A.140 establishes the requirement that local jurisdictions adopt public participation programs that provide for early and continuous public participation. The GMA has other public participation requirements. RCW 36.70A.020(11) establishes a goal to encourage the involvement of citizens in the planning process. RCW 36.70A.035 requires the county to establish notice procedures that are reasonably calculated to provide notice to property owners and other affected individuals and entities. RCW 36.70A.070 requires that the county adopt its comprehensive plan in accordance with its public participation procedures. *Spraitzar v. Island County,* Case No. 08-2-0023, FDO, at 6 (Nov. 10, 2008).

> --*See also, Spraitzer v. Island County* Dec. 3, 2008 Order on Reconsideration (RCW 36.70A.140 is not inclusive of the GMA requirements for effective public notification for early and continuous public participation and therefore a claim based on insufficient notice is required to assert a violation of RCW 36.70A.035 as opposed to RCW 36.70A.140).
>
> --*See also, Spraitzer v. Island County* July 24, 2008 Order on County's Motion to Dismiss (Dismissal of public participation claim based on WAC 24-02-530(6) is not warranted when evidence relevant to the challenge is not limited).

[In finding that the City made a significant change to a proposed ordinance without adequate notice to the public, the Board stated:] Public participation is indeed the keystone of the GMA, and it is incumbent upon jurisdictions to provide notice that is reasonably calculated to inform the public of the nature and magnitude of proposed changes to development regulations. In this instance, the failure to publish notice or otherwise notify the public of the changes that the City Council made in the Ordinance fell short of meeting that standard. … [the ordinance] represented a significant change from the draft presented for review and comment at the Planning Commission public hearing. As such, it was incumbent upon the Lacey City Council to provide the public with an opportunity for additional review and comment pursuant to RCW 36.70A.035(2). That did not occur and that failure resulted in a violation of the public participation goals and requirements of the GMA. *Panza, et al v. City of Lacey,* Case No. 08-2-0028, FDO, at 9-10 (Oct. 27, 2008).

In response to allegations that Lewis County failed to comply with the GMA's public participation requirements, in the coordinated cases of *Hadaller, et al v. Lewis County,* Case No. 08-2-0004, *Butler, et al v. Lewis County,* Case No. 99-2-0027, *Panesko, et al v. Lewis County,* Case No. 00-2-0031c, the Board held:

> The Board has no power to impose a mediation process upon the County. *FDO/Compliance Order,* at 20
>
> The retention of consultants with specialized expertise to assist in the County's planning efforts did not violate the GMA's public participation requirement so long as the public is not excluded from the process in favor of the retained consultants. *FDO/Compliance Order,* at 20
>
> The GMA contains no requirement that the County circulate public input [e.g. public comments received on the proposal] to the public. *FDO/Compliance Order,* at 22

While the Board does not have jurisdiction over Chapter 36.70 RCW, the Planning Enabling Act, where the County has imposed the requirements of the Planning Enabling Act upon itself as part of its process for adopting site specific plan amendments pursuant to RCW 36.70A.140, the Board has jurisdiction to review whether the County has complied with these provisions as a means of satisfying the GMA"s public participation program provisions. *Brinnon Group, et al v. Jefferson County,* Case No. 08-2-0014, FDO, at 7 (Sept. 15, 2008).

- **RECONSIDERATION**

Generally, the Board will not consider the application of Court decisions issued after the Board has reached its decision in a matter because it is the law and facts at the time the decision was rendered which confine reconsideration; not an interpretation of the law that was unavailable for consideration at the time of the Board's decision. To allow reconsideration based on legal interpretations made after issuance of a decision by the Board would frustrate the finality that is sought for land use decisions in Washington State. Here, however, the Supreme Court issued its decision in the *Thurston County* matter one day prior to the Board's issuance of the FDO and therefore the Court's interpretation was the law in place at the time. *Panesko, et al v. Lewis County,* Case No. 08-2-0007, Order on Reconsideration, at 7 (Sept. 15, 2008)

While it is true that the Board has previously held that Motions for Reconsideration will be denied when they present no new arguments that were not previously considered in the original decision,16 this is not to say that the opposite is true, i.e. that a Motion for Reconsideration is an opportunity to present new arguments that could have been presented at the Hearing on the Merits (HOM), but were not. *Brinnon Group, et al v. Jefferson County,* Case No. 08-2-0014, Order on Reconsideration at 4 (Oct. 14, 2008).

The HOM is the time for the parties to present their case and to allow Board questioning of the legal theories and the record on which the parties relied. Raising new arguments, or even making a more precise argument, in a motion for reconsideration should not be allowed and is not provided for in WAC 242-02-832(2). Allowing new or

restructured arguments would be wasteful of the parties' and the Board's limited time and resources. Instead, the parties should endeavor to make their most thorough and precise arguments in their hearing briefs and at the HOM. A Motion for Reconsideration then provides the opportunity to determine whether the Board committed one of the errors enumerated in WAC 242-02-832(2). *Brinnon Group, et al v. Jefferson County,* Case No. 08-2-0014, Order on Reconsideration at 6-7 (Oct. 14, 2008)

- **SHORELINES – Channel Migration Zones**

The regulations at issue for [Petitioner] in this case relate primarily to the County's adoption of Channel Migration Zones (CMZs) for four of its most prominent rivers. The Board notes all of these rivers are within the jurisdiction of the SMA and therefore land located within 200 feet of either side of the rivers falls under the jurisdiction of the SMA. Therefore, despite the lack of a mandate and the pending motion for reconsideration [in the case of *Futurewise, et al v. WWGMHB*, 162 Wn.2d 242 (2008)], this Board will adhere to the Court's unambiguous holding that critical areas within the shoreline are regulated by the SMA. Thus, for the area of the CMZ that is within the 200 foot shoreline jurisdiction, the Board views the County's action effectively as a segment of its SMP update which is subject to review and approval by Ecology. However … CMZs are not limited to a 200 foot area bordering either side of a river. Rather CMZs expand outward from the river's edge and encompass land in excess of the area within the SMA's regulatory boundaries. For the area of the CMZs that are located outside the 200 foot shoreline jurisdiction, these are critical areas squarely within the GMA's jurisdiction pursuant to RCW 36.70A.060, .170, and .172. As such, this Board has jurisdiction to review the adopted regulations for compliance with the GMA. *OSF/CPCA v. Jefferson County,* Case No. 08-2-0029c, FDO, at 16-17 (Nov. 19, 2008).

- **STANDING**

[In finding that Petitioner did not have standing, the Board held:] … [Petitioner] did not raise any subject or topic of concern in their comments, and did not suggest any controversy. [Petitioner's] statements did nothing to apprise the County of any concern that it had with the Yelm/Thurston County Joint Plan that necessitated attention. Instead, the County, City of Yelm, or any official reading those comments would have reasonably concluded [Petitioner] fully supported its actions. It is simply contrary to the GMA's intent for active public participation for a petitioner to raise no concern whatsoever to a jurisdiction's proposed amendments and then challenge those amendments before the Board. *Adams Cove Group, et al. v. Thurston County,* Case No. 07-2-0005, FDO at 12 (July 28, 2008).

- **STATE ENVIRONMENTAL POLICY ACT (SEPA)**

[T]he County cited the agency SEPA policies that formed the basis of the conditions imposed. Petitioner has failed to demonstrate that the County was legally obligated to

cite the supporting SEPA policy after each and every condition of approval. We do not read WAC 197-11-660 to impose such a requirement. *Brinnon Group, et al v. Jefferson County,* Case No. 08-2-0014, FDO at 30 (Sept. 15, 2008)

See also, Brinnon Group, et al v. Jefferson County, Case No. 08-2-0014, FDO, at 28-34 (Sept. 15, 2008) (Affirming the Standard of Review in SEPA matters, addressing consideration of alternatives, and the analysis of environmental impacts for non-project actions).

See also, Petree, et al v. Whatcom County, Case No. 08-2-0021c, FDO at 59-65 (Oct. 13, 2008) (Analyzing whether the County properly evaluated environmental impacts in relationship to a non-project action – UGA and Comprehensive Plan update – and whether the ultimate decision was within the scope of considered alternatives).

- **URBAN GROWTH AREAS**

See also, Market Factor

Petree, et al v. Whatcom County, Case No. 08-2-0021c at 19 -36 (Oct. 13, 2008) See for general background discussion as to the designation and sizing of UGAs and the County's duty. In this case, the Board held:

> The language of the GMA is clear – the ultimate authority to size UGAs resides with counties and, therefore, any assertions set forth within arguments presented … that purport otherwise are not supported by the plain language of the GMA. *FDO,* at 21.
>
> Under the GMA it is the responsibility and duty of Whatcom County to establish UGA boundaries. Although the GMA does require a county to consult with its cities as to boundary lines, as noted above, cities have no power, in and of themselves, to delineate UGAs. Cities are only capable of submitting a recommendation for the location of the UGA and filing any objection with Washington State Department of Community, Trade and Development (CTED) over the UGA designation or filing an appeal before the Board … the fact that the County didn't appeal the City's determination does not transform the City's recommendation into a binding mandate the County was forced to follow. *FDO,* at 22-23.
>
> [U]pon a proper challenge to the validity of a UGA delineation, the County's Record must contain an analytical analysis for assumptions utilized to make a UGA determination. That is, the County needs "to show its work" in developing its assumptions in order for a proper evaluation by the public and the Board of

> whether or not the County's action in delineating the UGA complies with the GMA. *FDO,* at 26-27.
>
> At the heart of the required analysis for determining the appropriate size of the UGA is a Land Capacity Analysis (LCA) in which the County determines if a UGA has sufficient capacity to absorb the projected growth. The LCA is a critical mechanism for the sizing of a UGA because it is utilized to determine how much urban land is needed. It is prospective – looking forward over the coming 20 years to see if there is enough land within the UGA to accommodate the growth that has been allocated to the area. However, part of this determination of how much land is available is filled with assumptions or "educated guesses" that lack absolute certainty. *FDO,* at 27.
>
> The Board reiterates that its role is not to determine whether one assumption is better than another assumption or to substitute its judgment for that of the County. Rather, its role is to ensure that the County's actions comply with the goals and requirements of the GMA, in this case – that the Bellingham UGA is sized to accommodate its allocated population projections. *FDO,* at 28-29.
>
> Although a UGA boundary drawn smaller than Bellingham may have originally recommended will undoubtedly entail changes in how the City will accommodate its allocated growth, this does not displace the City's authority to plan within its borders. Given the GMA's directive to counties to assign UGA boundaries, it is a statutorily permissible restraint. *FDO,* at 34.

See *Streicher v. Island County,* Case No. 08-2-0015, FDO at 6-15 (Sept 29, 2008) for a general discussion in regards to the land capacity analysis for the sizing of a UGA and locational criteria, which noted for sizing: (1) requirement to size the UGA for the 20-year *projected* population growth; (2) to determine whether there is enough land to accommodate projected, new growth by subtracting acreage which currently contains structures, areas that are impacted by critical areas, and areas which would be utilized to provide for future public use, including rights-of-way, sewer or water treatment facilities, parks and schools, along with the application of a reasonable market factor so as to ascertain a *net developable* acreage; and (3) once all reductions have been applied, the true net developable acreage is compared to the population demand in order to determine if a UGA is appropriately sized based on proposed uses and densities. And for locational criteria, RCW 36.70A.110, when read in conjunction with RCW 36.70A.030(18), provides that land "characterized by urban growth" is not just land that has urban growth on it but that is also land located in relationship/proximity to an area of urban growth.

> [RCW 36.70A.110(2)] requires counties to include areas and densities sufficient to permit the urban growth that is *projected to occur* for the succeeding twenty-year

period. *Panesko, et al v. Lewis County,* Case No. 08-2-0007, FDO, at 20 (Aug. 15, 2008)

[In the original FDO, the Board found that allowing a change from residential to commercial without linking it to an analysis of the commercial needs for the Irondale/Port Hadlock UGA or an analysis of the impacts of these commercial needs did not comply with the GMA. The Board concluded the County achieved compliance by amending] … Policy 1.6 to provide that parcels designated as Urban Residential on the UGA zoning map may be designated Urban Commercial provided that "The parcel rezone request is presented and approved through the annual comprehensive plan amendment process specified in JCC 18.45 JCC and the parcel rezone request is consistent and compatible with the Comprehensive Plan and future needs, documented through a commercial needs analysis …[and Policy 1.6 provides] that any change from Urban Residential to Urban Commercial shall be reflected on both the Comprehensive Plan Zoning Map and the Jefferson County Zoning Map, as they are the same. *ICAN v. Jefferson County,* Coordinated Case Nos. 03-2-0010, 04-2-0022, 07-2-0012, Order on Compliance, at 6 (Oct. 22, 2008).

[I]f a UGA needs to be expanded to accommodate population growth, the County is to first look to land already characterized by urban growth, to rural lands, and then, if no other suitable land is available, [the County] could evaluate if natural resource lands should be de-designated to accommodate growth. Coordinated Cases *Hadaller, et al v. Lewis County,* Case No. 08-2-0004, *Butler, et al v. Lewis County,* Case No. 99-2-0027c, *Panesko, et al v. Lewis County,* Case No. 00-2-0031c, FDO and Compliance Order, at 52 (July 7, 2008).

[In response to Intervenor's assertion that the Housing Cooperation Law, RCW 35.83, authorized Lewis County's action in expanding a UGA, the Board stated:] … CITH's assertion that the HCL has a broad, pre-emptive scope which allows for cities and counties to act outside of the scope of the GMA's mandate. As noted *supra,* the HCL was adopted in 1939 and was last amended in 1991, after the adoption of the GMA, but only in regards to slight modifications to existing provisions. The GMA was enacted in response to a statewide need for planned and coordinated growth and seeks to, among other things, reduce sprawl, protect the environment, maintain and enhance natural resource industries, ensure public facilities and services, and encourage affordable housing. Although discretion and deference is given to local jurisdictions, there is no indication in either piece of legislation to indicate that the GMA is subordinate to the HCL nor is there any language in the HCL which appears to provide for an exemption from the requirements of any other state law, including the GMA. *Panesko, et al v. Lewis County,* Case No. 08-2-0007, FDO, at 27 (Aug. 15, 2008).